

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,

Charging Party,

- and -

XPO CARTAGE, INC.,

Respondent.

Case Nos. 21-CA-150873  
21-CA-164483  
21-CA-175414  
21-CA-192602

**XPO CARTAGE, INC.'S REQUEST FOR SPECIAL PERMISSION  
TO APPEAL THE ALJ'S ORDER REQUIRING THE HEARING BE CONDUCTED  
BY VIDEOCONFERENCE**

Pursuant to Section 102.26 of the National Labor Relations Board's Rules and Regulations, XPO Cartage, Inc. ("XPO" or "Employer"), for the reasons stated below requests special permission to appeal the July 14, 2020 order by Administrative Law Judge Dibble requiring the hearing to be conducted by videoconference. The Employer objects to holding a hearing by videoconference and requests that the hearing be conducted in person, or another agreed-upon format, on a date, time, and location to be determined. XPO understands that the Charging Party also opposes a videoconference hearing, and that only the General Counsel wishes to go forward in that format. The hearing currently scheduled for October 6, 2020 is a supplemental hearing relating to specific issues raised by *SuperShuttle DFW, Inc.*, 387 NLRB No. 75 (2019), and follows multiple days of live testimony at the initial hearing.

**I. A Videoconference Hearing Will Unacceptably Diminish the Ability To Assess Witness Credibility and Be Unduly Burdensome**

The initial trial in this matter hinged in several respects on witness credibility determinations made by the ALJ, and many of the witnesses required interpreters. It is anticipated that such credibility determinations and the added challenge of language barriers will again be core issues in the supplemental hearing; these factors render the format of a videoconference hearing inadequate to meet procedural due process needs.

It is self-evident that a videoconference hearing will hamper the ALJ's ability to engage in nuanced credibility determinations, which the Board explicitly found was a necessary part of the proceedings when it granted XPO the supplemental hearing: "IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Christine E. Dibble for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations affected by *SuperShuttle* and setting forth ***credibility resolutions***, findings of fact, conclusions of law, and a recommended Order." XPO Cartage, Inc., 21-CA-150873, (May 10, 2019) (Order Remanding) (emphasis added). From a fact-finding perspective, the ability to read expressions, assess body language, make eye contact, and obtain meaning from the timing and tone of witness testimony will all be significantly diminished. Counsel's ability to lay bare any credibility concerns will be similarly hampered. The credibility determination issue alone is sufficient to postpone the supplemental hearing until it can be conducted in person.

Coupling these credibility issues with the language translation concerns makes the videoconferencing format even more inadequate and burdensome. During the first trial, many of the Charging Party's witnesses relied on Spanish translators, and the ALJ expressed her preference for simultaneous translation. *See* Tr. at 1481:20-23. XPO presently expects, and has been informed, that the Charging Party and General Counsel will seek testimony of additional Spanish-speaking witnesses, requiring the use of a translator. The inherent time delay caused by videoconference technology will create substantial difficulties in presenting translated testimony; the initial hearing was already bogged down with administrative complications caused by live translation. Based on the ALJ's order, it is unclear how translators will interact with the videoconference technology and what to do in the situation where the translator or witness loses internet connection, which thereby impacts adversely the supplemental record that the Board has ordered in this case. A videoconference hearing is thus insufficient to address the added complexity anticipated by the Board's order for a supplemental hearing.

## **II. There Is No Good Cause Showing For A Videoconference Hearing**

Section 102.35(c) of the Board's Rules and Regulations requires a party to show good cause before a videoconference hearing may be ordered:

(c) Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

(1) Applications to obtain testimony by videoconference **must be presented to the Administrative Law Judge in writing**, and the requesting party must simultaneously serve notice of the application upon all parties to the hearing....

29 C.F.R. § 102.35(c)(1) (emphasis added). The regulatory language thus requires a party to request a videoconference hearing before the ALJ can determine whether to permit it. *See Tesla, Inc.*, 32–CA–197020, unpub. Board order issued July 16, 2018 (2018 WL 3436889) (ALJ denied General Counsel’s request for motion by videoconference). Here, neither party has requested a hearing by videoconference, no good cause showing has been made, and indeed, a videoconference supplemental hearing is ill suited to accomplish the Board’s objectives on remand. In such circumstances, the videoconference format should not be permitted.

### **CONCLUSION**

For the foregoing reasons, a videoconference hearing falls far short of minimal standards for a full and fair supplemental hearing anticipated by the Board’s Order in light of its decision in *SuperShuttle*. The current COVID-19 crisis does not justify setting aside basic procedural due process and other rights in the name of convenience or expediency. The ALJ should be required to rescind her Order and postpone the hearing to a date when it can be held in person.

DATED: July 24, 2020

Respectfully submitted,  
  
XPO CARTAGE, INC.

By: MARSHALL B. BABSON /S/

Marshall B. Babson

[mbabson@seyfarth.com](mailto:mbabson@seyfarth.com)

Michael Marino

[mmarino@seyfarth.com](mailto:mmarino@seyfarth.com)

Holger Besch

[hbesch@seyfarth.com](mailto:hbesch@seyfarth.com)

SEYFARTH SHAW LLP  
601 South Figueroa Street, Suite 3300  
Los Angeles, California 90017  
Telephone: (213) 270-9600  
Facsimile: (213) 270-9601

Counsel for Respondent  
XPO CARTAGE, Inc.

## CERTIFICATE OF SERVICE

I, Holger G. Besch, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing XPO CARTAGE, INC.'S REQUEST FOR SPECIAL PERMISSION TO APPEAL via electronic filing, and on all parties of record via email on this 24th day of July 2020 and that an electronic copy has been served on Administrative Law Judge Dibble:

Mathew Sollett  
National Labor Relations Board, Region 21  
312 N. Spring Street, 10th Floor  
Los Angeles, CA 90012  
[Mathew.Sollett@nlrb.gov](mailto:Mathew.Sollett@nlrb.gov)

Molly Kagel  
National Labor Relations Board, Region 21  
312 N. Spring Street, 10th Floor  
Los Angeles, CA 90012  
[Molly.Kagel@nlrb.gov](mailto:Molly.Kagel@nlrb.gov)

Hector De Haro  
Bush Gottlieb, a Law Corporation  
801 North Brand Boulevard, Suite 950, Glendale, CA 91203  
[hdeharo@bushgottlieb.com](mailto:hdeharo@bushgottlieb.com)

Julie Guttman Dickinson  
Bush Gottlieb, a Law Corporation  
801 North Brand Boulevard, Suite 950,  
Glendale, CA 91203  
[JGD@bushgottlieb.com](mailto:JGD@bushgottlieb.com)

Christine E. Dibble  
Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
Washington, DC 20570  
[Christine.Dibble@nlrb.gov](mailto:Christine.Dibble@nlrb.gov)



---

Holger G. Besch